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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Warren Pumps, Inc.

File: B-248145.2

Date: September 18, 1992

David R. Hazelton, Esq., and Franklin G. Snyder, Esq., Latham & Watkins, for the protester.
John W. Fowler, Jr., Esq., and Robert G. Fryling, Esq., Saul, Ewing, Remick & Saul, for Ingersoll-Rand Company, an interested party.
Stephen H. S. Tryon, Esq., and Charles J. McManus, Esq., Department of the Navy, for the agency.
Christina Sklarew, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency failed to consider a fixed-price offer submitted under request for proposals that was issued on a cost-type basis (in spite of assurances that such offer would be considered) is dismissed as abandoned where protester fails to pursue the issue in its protest comments.

2. Protest that agency's award of a contract on the basis of initial proposals was improper is dismissed as untimely where it relies on information contained in the solicitation or known to the protester more than 10 days before the protest was filed; specifically, untimely portions of the protest involve: (1) the agency's failure to include the Federal Acquisition Regulation clause currently required in order for Department of Defense awards to proceed without discussions; and (2) the agency's refusal to accept a proposed reduction in the protester's price, which the agency regarded as an improper late modification.

3. Where protester fails to timely protest defect in solicitation's initial proposal award provision (lack of alternate clause), award on basis of initial proposals was proper where it was consistent with terms of the basic clause contained in the solicitation.

DECISION

Warren Pumps, Inc. protests the Department of the Navy's award of a contract to Ingersoll-Rand, Engineered Pump Division, under request for proposals (RFP) No. N61533-91-R-0035. The RFP was issued by the David Taylor Research Center for the design of a family of standardized centrifugal pumps to be used in a variety of ways on board Navy ships. The RFP contemplated the award of a cost-plus-fixed-fee contract. The protester alleges that the contracting officer agreed to accept a firm, fixed-price offer, but when Warren submitted an offer priced in this way, the Navy failed to consider it. Warren also protests that the agency was required to hold discussions under the circumstances of this procurement. We dismiss the protest.

The RFP was for the design and development, in three phases, of a family of pumps for use on Naval ships. The Navy uses thousands of centrifugal pumps on board its ships for a wide variety of applications, such as fire protection, equipment cooling, fresh water distillation and waste water transfer, and currently uses many different pumps that vary in design and require stocking a high volume of spare parts. In order to reduce the burdensome support and maintenance requirements of these pumps, the Navy decided to develop a family of centrifugal pumps from one standard design. Because the design and development work would necessarily involve some trial and error and would be of an uncertain technical nature, the Navy decided to solicit offers based on the award of a cost-type contract.

The RFP required the submission of separate technical and cost proposals and advised that an offeror's score for the technical and management areas in its proposal would be weighted more than twice as much as the offeror's cost score. The RFP stated that the government may award on the basis of initial offers received, without discussions, and that each offer should contain the offeror's best terms from a cost or price and technical standpoint.[1] Award was to be made to the conforming offeror whose proposal was most advantageous to the government, cost or price and other factors considered.

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[1]As explained below, this provision advising offerors of the possibility of award on the basis of initial proposals reflected in part the basic "Contract Award (July 1990)" clause found at Federal Acquisition Regulation (FAR) § 52.215-16 without Alternate III (Aug. 1991) (Alternate III permits Department of Defense and certain other agencies under certain circumstances to make award based on initial proposals to other than the lowest overall cost offeror).

The Navy issued the RFP to 18 companies on its source list, including Warren and Ingersoll. Warren, believing that its current accounting system was inadequate to allow it to submit a cost-type offer, asked the contract negotiator if it could submit an offer on a fixed-price basis. When the negotiator agreed to consider an offer of this type, Warren prepared its proposal based on a fixed price. In addition to Warren's offer, the Navy received cost-plus-fixed-fee offers from Ingersoll and Dresser Pump by the closing date in late October 1991.

A technical evaluation panel reviewed the three technical proposals and prepared an evaluation report in November. The report included a consolidated summary of the comments and questions raised by the team members as well as evaluation scores for each offer. It recommended that the proposal from Dresser be eliminated from further consideration, finding it technically unacceptable. The remaining two offers were both acceptable, with Ingersoll's point score for technical merit slightly higher than Warren's. Ingersoll proposed a price of $2,388,694 while Warren proposed a price of $3,330,354. The panel recommended conducting discussions with both firms.

In December, the negotiator and the chairman of the evaluation panel decided that because Ingersoll had received the higher technical score and offered the low cost/price (by nearly a million dollars), discussions would not be necessary. The chairman evaluated Ingersoll's cost proposal for cost realism, and found it realistically represented the work required. In February, the contracting officer prepared the business clearance memorandum required under the Navy's acquisition regulations, seeking approval to award the contract to Ingersoll without discussions. Ten days before the memorandum was signed by the approving official in March, Warren submitted an unsolicited price modification, lowering its price by approximately $750,000. The Navy determined that it could not consider the revision as an alternate proposal, concluding that the submission was an impermissible late modification. The Navy awarded the contract to Ingersoll on March 19 and advised Warren the following day. The Navy debriefed Warren, and this protest followed.

Warren's protest, as originally submitted, focused on complaints that the Navy had never seriously considered its fixed-price proposal and had never developed a method of evaluating an offer priced in this way. In its agency

report, the Navy rebutted this allegation in detail.[2] In its comments on the agency report, Warren does not address this matter, but solely argues as a new basis of protest that the agency failed to conduct discussions, pointing out various reasons why it allegedly was required to do so here.

We find that Warren has abandoned its original protest regarding whether the Navy had actually given Warren's fixed-price offer full consideration, since it failed to pursue the matter in its protest comments.[3] Where an agency specifically addresses an issue raised by the protester in the initial protest and the protester fails to respond to the agency's responses, we consider the issues to have been abandoned by the protester. TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573. This is exactly what occurred here.

Warren also protests that the agency failed to conduct discussions, which the protester contends were required because: (1) the agency failed to insert into the RFP a clause, FAR § 52.215-16 Alternate III; (2) Warren attempted to reduce its price, which the protester asserts should have alerted the agency to the possibility that negotiations would be highly advantageous to the government, (3) technical questions were raised by the technical evaluation panel but were never presented to the offerors; and (4) there were differences among the technical evaluators in their scoring of Warren's initial proposal, which differences Warren believes would have been corrected in Warren's favor through discussions.

We dismiss the first two of these arguments as untimely raised. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1992). In all other cases, protests must be filed not later than 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Here, Warren knew at the time it received the RFP that the solicitation failed to include the current Alternate III clause that was required if the agency intended to award the contract on the basis of initial proposals (or the Alternate II clause which requires

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[2]The Navy essentially stated that while it was not required to consider Warren's fixed-price proposal, it did accept and evaluate it fully.

[3]We do point out that it was permissible for the Navy to accept the fixed-price offer without altering the RFP in this situation. See Marine Mgmt. Sys., Inc., B-185860, Sept. 14, 1976, 76-2 CPD ¶ 241.

discussions if the agency does not intend to award on initial proposals). It did not protest this defect prior to the closing date. Similarly, regarding the agency's refusal to consider Warren's offer to reduce its price, submitted on March 9, the protester had all of the relevant information by the time it was debriefed on March 26; yet it did not mention this in its protest, raising it instead only in its May 20 comments. Accordingly, these two bases of protest are dismissed.

Warren contends that it only learned upon receipt of the agency report that the technical evaluators had compiled a list of questions for Warren and Ingersoll, identifying omissions or weaknesses in their proposals that could have been answered during discussions. The protester argues that it could have answered all of these questions and resolved the differences among the technical evaluators, and that it was improper for the agency to award the contract based on initial proposal without discussions.

As stated above, Warren failed to timely protest the RFP's lack of the current clause (FAR § 52.215-6, Alternate III). Accordingly, we must simply resolve whether the agency awarded the contract to Ingersoll consistent with the terms of the solicitation based on initial proposals without discussions. We find that the agency properly did so.

By way of background, under a provision of the Competition in Contracting Act of 1984 (CICA), codified at 10 U.S.C. § 2305(b)(4)(A)(ii) (1988), a contracting agency formerly could award a contract without conducting discussions with the offerors:

> "when it [could] be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States."

This provision of CICA prohibited agencies from accepting an initial proposal that was not the lowest (considering only cost and cost-related factors listed in the RFP) where there was a reasonable chance that by conducting discussions, another proposal would be found more advantageous to the United States under the evaluation factors listed in the solicitation. Hall-Kimbrell Envtl. Servs., Inc., 66 Comp. Gen. 280, 282 (1987), 87-1 CPD ¶ 187; Training and Information Servs., Inc., 66 Comp. Gen. 327 (1987), 87-1 CPD ¶ 266.

The National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 802, 104 Stat. 1485, 1588 (1990), amended 10 U.S.C. § 2305(b)(4)(A). The amendment, which became effective March 1991, deleted the requirement that a contract award made on initial offers without discussions result in the lowest overall cost to the government.[4] As implemented by FAR § 15.610(a), this provision authorizes agencies whose procurements are governed by Title 10 of the United States Code to award contracts on the basis of initial proposals without conducting discussions if the contracting officer determines that discussions are not necessary and the solicitation contains the provision at FAR § 52.215-16 with its Alternate III. The language of Alternate III provides:

> "The Government intends to evaluate proposals and award a contract without discussions with offerors (other than discussions conducted for the purpose of minor clarification). However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint."

Thus, with respect to negotiated procurements, Department of Defense (DOD) agencies are authorized to make award based on initial offers, without discussions or negotiations, to a technically acceptable offeror which did not offer the lowest price or cost to the government, if the solicitation, in accordance with FAR § 52.215-16, states the government's intention to do so and advises offerors that their initial offers should contain the best cost or price and technical terms.

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[4]As amended, 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1991), now reads:

> "(4)(A) The head of an agency . . . may award a contract--
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> (ii) based on the proposals received, without discussions with offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary."

Here, the agency does not dispute that the solicitation was required to and should have contained the Alternate III clause if the agency intended to award based on initial proposals. Conversely, if the agency intended not to award based on initial proposals, it was required to insert in the solicitation Alternate II to the basic clause which requires discussions. See FAR § 52.215-16. The agency did neither, but instead retained the terms of the basic clause alone which states that the government "may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint." Thus, since the RFP specifically advised offerors that award might be made on the basis of initial offers without discussions and also advised offerors to submit their best terms from a cost or price standpoint, we think that the award to Ingersoll, the highest technically rated and lowest cost offeror, was proper and consistent with the terms of the solicitation.

The protest is dismissed.

Michael R. Golden
Assistant General Counsel